IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 89 of 1993.
Reserved on 29.10.2007.

Date of Decision: . 6-11-2007

State of H. P. Appellant.

Versus

Dina Nath. . Respondent.

Coram

Hon'ble Mr. Justice Surjit Singh, J.

Hon'ble Mr. Justice Surinder Singh, J.

Whether approved for reporting[1]?

For the appellant : Mr. S.D. Vasudeva, Addl. Advocate General with Mr. D.S. Nainta, Dy. Advocate General.

For the respondent : Mr. Dharamvir Sharma, Advocate.

SURINDER SINGH, J.

The respondent was tried and acquitted for the offences under Section 376 and 341 of the Indian Penal Code for having allegedly committed the offence of rape of the prosecutrix who was aged about ten years at the time of the alleged occurrence.

In brief, the prosecution case can be stated thus: On 15-6-1990 at about 8.00 P.M., the prosecutrix had gone to ease herself in the field nearby. On her way back to her house she met the respondent. He caught hold of her, gagged her mouth, lifted and laid down her on the ground near the Chuhli tree. Thereafter, he removed her salwar and committed sexual intercourse forcibly on account of which the prosecutrix got fainted. The respondent ran away from the spot. After regaining the consciousness, she put on her salwar and came to the house. She did not make any complaint

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Whether reporters of the Local papers are allowed to see the judgment? Yes.

to her mother Nanki due to the threatening given by the respondent. But on the third day, i.e, 17.6.1990, when the pain kept on persisting in her private part, she disclosed it to her mother Nanki Devi. Her mother revealed it to her son Datta (PW), sent for his father (PW6) who had gone to village Thunag. The entire story was narrated to him. On 19.6.1990 PW6 went to the Police Station Ratti at about 2.00 P.M. and lodged the report Ex. PD. Thereafter the Police visited the house of the complainant and took the prosecutrix for medical examination to District Hospital, Mandi where she was examined by PW2 Dr. R.P. Malhotra. It was disclosed to the Doctor that her mouth was gagged and she was raped two days back. She had taken bath and changed her clothes.

On her physical examination, the Doctor found her to be 15 kg in weight and 127 cm in height. There were 6 +6 teeth present on upper jaw and 6 + 6 in the lower jaw. Her breast was not developed. Her axillary and pubic hair were not present. On the external examination, the said Doctor found swelling of upper lip and a tooth mark abrasion on the left cheek which was brownish in colour. There was no fresh bleeding from the injury, though it was tender. However, no other external injury was found. On local examination, valva was found oedamatous (swollen) reddish in colour and tender. Hymen was torn and oedamatous. There was no fresh bleeding and her vagina admitted one finger painfully. Uterus was small in size and fornices were free. Vaginal smear was taken and examined which showed no dead or alive spermatozoa.

For verification of the skeletal age, she was referred for radiological examination, which was conducted by Dr. S.K. Malhotra (PW1). On the basis of the epiphysis of bones, the Doctor opined her age between nine to twelve years (Ex. PA).

In the opinion of Dr. R.P. Malhotra (PW2), the prosecutrix was exposed to coitus. Lip and tooth mark cheek injury were found simple

in nature caused by a blunt weapon. Probable duration was more than 48 hours at the time of examination . The Doctor described all the above facts in her medico legal certificate Exhibit PC.

On the registration of the FIR, the respondent was arrested. He was produced before Dr. N.K. Handa (PW8) for his medical examination on 20.6.1990. No external injury was found which was suggestive of physical violence. However, he was found fit to perform the sexual inter-course as per the MLC Ext. PH.

After completing the investigation, the challan was presented in the Court under the aforesaid sections. The respondent was charge-sheeted for the above offences. He pleaded not guilty and claimed trial.

To prove its case besides examining the prosecutrix, the parents of the prosecutrix and her brother Datta and Doctors were examined by the prosecution. During the trial, the Salwar Ext. P3 and shirt Exhibit P4 were identified by the prosecutrix to be her own and she proved the underwear Exhibit P5 to be that of the respondent which fact was further corroborated by PW7 Om Parkash, a marginal witness to the recovery. PW9 Charanjit Singh had issued the certificate Exhibit PJ based upon the Panchayat record showing her date of birth as 7.12.1979. On chemical examination of the clothes of the prosecutrix and the underwear of the respondent, no semen or human blood was found.

After hearing the parties and upon going through the evidence on record, the trial court concluded that besides the delay of four days in lodging the FIR, the prosecution evidence was held to be weak and feeble which was insufficient to base the conviction of the respondent. Accordingly, the respondent was acquitted.

The State felt aggrieved and the acquittal of the respondent has been challenged in this appeal on law and facts.

Shri Som Dutt Vasudeva, learned Additional Advocate General, has vehemently argued that the findings of the learned trial Court exonerating the respondent from the charge of rape are absolutely illegal thus un-sustainable because the learned trial Court did not appreciate the evidence of the prosecutrix in the right perspective. The delay in lodging the FIR stood properly explained, the prosecutrix was under the threat of the accused, she made the complaint to her mother Nanki Devi, thereafter she took the follow up action. It is also contended that the version of the prosecutrix finds corroboration from the medical evidence. Therefore, the impugned judgment of acquittal can be converted into conviction.

On the other hand, Shri Dharamvir Sharma, learned counsel for the respondent while supporting the impugned judgment of acquittal has forcefully argued that the version of the prosecutrix does not inspire confidence which is full of contradiction, thus cannot be believed.

We have given our thoughtful consideration to the rival contentions of the parties and have carefully examined the statement of the prosecutrix in the light of the other evidence on record.

Though the learned sessions Judge held the prosecutrix, a minor girl of 11 years of age, at the time of the alleged incident but he did not believe her version because:

i) there was an unexplained delay of four days in lodging the FIR.

ii) The Doctor deposed that the injury on her lip could be caused due to fall and tooth injury by hugging.

iii) The tear of hymen could be due to insertion of finger or thumb;

iv) Doctor did not observe any swelling on her private part;

v) No dead or alive spermatozoa was detected on her vaginal examination.

vi) The prosecutrix stated that her *salwar* and shirt were blood stained but on examination by the Forensic Science Laboratory no blood or semen was detected;

vii) According to the prosecutrix, the respondent remained on her breast for about 5 to 7 minutes. It was a ploughed field having stone and pebbles but she did not get any injury, making her version a suspect;

viii) In the above circumstances, the defence plea that the case was framed against the respondent at the instance of Khub Ram and Beasa Devi who were inimically disposed of towards the respondent but were friendly to the complainant, became probable.

Now we proceed to discuss the evidence of the prosecution in order to find out whether the learned trial court has rightly dealt with and appreciated the facts in accordance with law.

At the very outset, we would like to say that the learned trial court has held the prosecutrix, a minor girl of 11 years, at the relevant time. From the evidence on record, we have found these findings are absolutely correct. Because at the time of her medical examination the Doctor Malhotra (PW2) from her physical structure had found her a child of 15 kgs in weight and 127 cm in height. She had 6 + 6 teeth on her upper and lower jaws. Her breast was not developed and her pubic and auxiliary hair were also not present. On the basis of her ossification test, her age was opined between 9 to 12 years. Even by giving the benefit of error of ± 2 years, as deposed by Dr.S.K.Malhotra (PW1), she would be less than 14 years. The prosecutrix (PW3) has deposed her age 11 years on 20.8.1991, when she was examined in the court. This fact has further been

corroborated by her mother Smt.Nanki Devi (PW4) and her father Shri Chilu Ram (PW6). The above facts match with the statement of PW9 Charanjit Singh, Secretary Panchayat who has proved her birth certificate Ex. PJ issued by him, based upon the Panchayat record. Therefore, on the basis of the above unrebutted material we are of the view that the prosecutrix was a minor girl of 11 years at the time of alleged incident.

Now coming to the delay part, we would like to say that the learned trial court did not deal with the matter in the right perspective. According to the prosecutrix, after committing the crime, the respondent had threatened her that in case she would disclose it to any body, he would give beatings to her. She was a child at that time; she took the threat seriously and did not disclose it to any one till the pain in her private parts persisted and became unbearable. It was thereafter she disclosed about the cause of pain to her mother (PW4) on 18.6.1990. Further her mother narrated this story to her son Data Ram (PW5) and told him to contact his father, who had gone to village Thunag. On the same day, PW5 Data Ram met his father (PW6) at about 6 p.m. in the said village and revealed the entire story to him. Next day, on 19.6.1990 they went to the Police Station Ratti, where the report Exhibit PD was lodged by him.

In view of these facts proved on record, in our considered opinion, delay in lodging the FIR stands properly explained. The Supreme Court in *Sri Narayan Saha and another* versus *State of Tripura* : AIR 2005 Supreme Court, 1452 has held that merely because the complaint was lodged less than promptly, does not raise the question that the complaint was false. Many a times reluctance to go to the police is because of society's attitude towards such women, it casts doubt and shame upon her rather than comfort and sympathy with her. But in our view, where the prosecutrix is minor girl and unmarried, as in this case the situation

becomes more difficult to decide whether the matter should be made public or reported to the police or not.

In other words in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. Even if there is some delay in lodging FIR in respect of offence of rape, if it is properly explained and the explanation is natural in the facts and circumstances of the case, such delay would not matter. Even otherwise, the delay in lodging the complaint in such cases does not necessarily indicate that her version is false.

Keeping in view above facts and law in mind we are not in agreement with the trial court on this issue that there was un-explainable delay in lodging the FIR, which has made the case of the prosecution doubtful.

As far as the version of the prosecutrix is concerned, we are constrained to observe that the learned trial court has given quite unconvincing reasons to dis-believe her, more specifically when it is corroborated by the medical evidence in material particulars.

The prosecutrix has vividly stated that while returning to her house at about 8 p.m. respondent met her on the way. He caught hold of her and gagged her mouth with his hand. She could not raise any alarm. He took her to nearby a tree, made her lie on the ground, removed her salwar and committed sexual intercourse forcibly, due to which she fainted. After committing the sexual act the respondent fled away from the place of occurrence. She has stood well in her cross-examination, in so far as the act of commission of crime by the respondent is concerned. Though she has stated that the place of occurrence was a ploughed surface and there

were stone and pebbles but she did not receive any injury on her back and in fact she did not sustain any injury on her back as also observed by the Doctor. But in our opinion, not having any injury on her back, her version does not become doubtful. She had clarified that she did not try to struggle because the accused had threatened her. Smt. Nanki Devi, mother of the prosecutrix, to whom she had narrated the incident had also made the similar version. There is a consistency in the statement of the prosecutrix. Her brother Datta Ram and father Chilu Ram have lent strength to her case. Further we find corroboration of her statement by the medico-legal-certificate Ex.PC which has been proved by PW2, Dr. R. P. Malhotra, who had found swelling on the upper lip; tooth mark abrasion on the left cheek, which is suggestive of putting pressure on her mouth by the respondent as stated by her. The valva was found oedamatous (swollen) reddish in colour and tender; hymen was torn and oedamatous, vagina admitted one finger and it was painful. Therefore, the finding of the trial court that there was no swelling on the private part of the prosecutrix is palpably wrong.

Further, the trial court took note of the fact that neither the clothes of the prosecutrix nor the underwear of the accused, were found blood stained and that it also did not contain dead or alive spermatozoa. It is pertinent to note that before the Doctor at the time of her medical examination she had alleged rape and stated having taken bath and also disclosed that her clothes were washed by her mother therefore, there arises no question of presence of any such stains on her body and clothes. The Apex Court in *Prithi Chand versus State of Himachal Pradesh*: *AIR 1989 Supreme court 702*, has held that mere absence of spermatozoa cannot raise a doubt on the correctness of the prosecution case.

Contra, the defence raised by the respondent, that the instant case was foisted upon him by the parents of the prosecutrix at the behest of Khub Ram and Biasa Devi, is also un-believable. It is beyond our

comprehension that why the parents of the minor girl of a tender age would allow the other persons to use them, by involving their minor girl by imputing an allegation of rape against the respondent. The parents of the prosecutrix in the instant case would not have waited for four days to implicate the respondent at the behest of Khub Ram and Biasa Devi when the alleged incident had taken place on 15.6.1990. It is totally impossible to believe that the prosecutrix and her parents would allow the real culprit to escape and falsely implicate innocent respondent in the commission of the said crime. Thus, we find that the plea taken in the defence is absolutely false.

The upshot of the above discussion is that on the reappraisal of the evidence of the prosecution, for the reasons stated above, we are of the view that charges against the accused-respondent under section 376 and 341 of the Indian Penal Code stand fully proved. The findings of acquittal recorded by the learned trial court are perverse. Therefore, the impugned judgment of acquittal passed by the learned trial court is set aside. The respondent is convicted of the offence under sections 376 and 341 of the Indian Penal Code.

The respondent be produced on 21st November, 2007 to hear him on the quantum of sentence.

(Surjit Singh),J.

November 6, 2007 (Surinder Singh),J.
(bm/D)